

ADMINISTRATIVE DIRECTOR
DIVISION OF WORKERS' COMPENSATION
DEPARTMENT OF INDUSTRIAL RELATIONS
STATE OF CALIFORNIA

ORDER DESIGNATING PRECEDENT DECISION

Government Code § 11425.60

WHEREAS Administrative Law Judge Cheryl R. Tompkin of the Office of Administrative Hearings conducted an evidentiary hearing on May 16, 2007 in the matter of the *Statement of Issues against Michael A. Fraga, Psy.D.*, OAH case no. N-2007020648, to determine whether Dr. Fraga's application for certification as a Qualified Medical Evaluator had properly been denied by the Administrative Director of the Division of Workers' Compensation; and

WHEREAS Judge Tompkin issued a decision in the matter on December 13, 2007 determining that the application had properly been denied; and

WHEREAS the Administrative Director adopted Judge Tompkin's decision in an order dated December 18, 2007; and

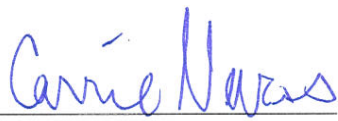
WHEREAS Dr. Fraga challenged the Administrative Director's order in a petition for administrative mandamus in the matter of *Fraga v. Division of Workers' Compensation*, Sonoma County Superior Court case no. SCV 242435; and

WHEREAS Superior Court Judge Mark H. Tansil issued an order on February 3, 2009 approving the denial of Dr. Fraga's application and dismissing his petition for administrative mandamus in its entirety; and

WHEREAS the decision in this matter contains significant legal and policy determinations of general application that are likely to recur,

IT IS ORDERED that the attached December 28, 2007 Order After Hearing and February 3, 2009 Order Denying Petition for Administrative Mandamus and Statement of Decision are hereby designated as a precedent decision of the Division of Workers' Compensation pursuant to Government Code § 11425.60(b).

Dated: February 17, 2009


CARRIE NEVANS
Acting Administrative Director

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BEFORE THE ADMINISTRATIVE DIRECTOR
DIVISION OF WORKERS' COMPENSATION
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against

Michael A. Fraga, Psy.D.
401 South A Street
Santa Rosa, California 95401

California Board of Psychology
License No. PSY 17169

Respondent.

AD Case No. 2005-25392

OAH Case No. N2007020648

ORDER AFTER HEARING

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Administrative Director as her decision in the above-entitled matter.

This Order shall become effective immediately.

Dated: 12/28, 2007



CARRIE NEVANS

Administrative Director
Division of Workers' Compensation

BEFORE THE
ADMINISTRATIVE DIRECTOR
DIVISION OF WORKERS' COMPENSATION
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

MICHAEL A. FRAGA, Psy.D.,
401 South A Street
Santa Rosa, California 95401

California Board of Psychology
License No. PSY 17169

Respondent.

OAH No. N2007020648

Case No. 2005-25392

PROPOSED DECISION

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings, heard this matter on May 16, 2007, in Oakland, California.

Attorney Michael Hurley, California Department of Industrial Relations, Division of Workers' Compensation, represented complainant Carrie Nevans.

Attorney Fred Engbarth represented respondent Michael A. Fraga, Psy.D., who was present at hearing.

The record was held open to permit the parties to obtain a transcript and file closing briefs. On November 7, 2007, the Office of Administrative Hearings received written notice from respondent's counsel that respondent had decided to submit the matter on the record and to not file a closing brief. The notice was marked as Exhibit 18 for identification. On November 13, 2007, the Office of Administrative Hearings received written notice from complainant's counsel that complainant would also submit the matter on the record and not file a closing brief. The notice was marked as Exhibit G for identification. The matter was deemed submitted on November 13, 2007.

FACTUAL FINDINGS

1. Complainant Carrie Nevans made the Statement of Issues and Final Administrative Order Regarding Non-Appointment in her official capacity as Acting

Administrative Director of the Division of Workers' Compensation (DWC), Department of Industrial Relations.

2. On September 13, 2006, Michael A. Fraga, Psy.D., (respondent) filed an application with DWC seeking appointment as a Qualified Medical Evaluator (QME). Complainant asserts respondent's application is subject to denial because respondent has been convicted of a felony related to the conduct of his practice and because respondent made a material misrepresentation in prior applications for appointment as a QME.

Criminal Convictions

3. On August 18, 1983, in the United States District Court, District of Massachusetts, respondent was convicted, upon his plea of guilty, of a violation of title 21 United States Code section 846 (conspiracy to possess with intent to distribute a Schedule II controlled substance), and a violation of title 21 United States Code section 2 (possession with intent to distribute and distribution of a Schedule II controlled substance), both felonies.

Applicant was sentenced to three years in prison with a "special parole" term of three years. Applicant was released in 1985 after serving two years, but had his special parole revoked and was returned prison for an additional nine months after being fined for a traffic infraction. (Respondent backed into another vehicle, inspected it, and then left the scene without leaving his name.) Applicant was re-released on parole in September 1988, and completed parole in 1990.

4. Following his release from parole in 1990, respondent began taking graduate courses to become a psychologist. He obtained his Master of Arts in Psychology in 1991. On or about August 5, 1996, respondent submitted an application to the California Board of Psychology for registration as a psychological assistant. On the application respondent disclosed that he had been convicted in federal court of possession of cocaine with the intent to distribute, but failed to list a subsequent 1994 misdemeanor conviction for "wet reckless."¹ The Board of Psychology denied respondent's application for registration as a psychological assistant on October 25, 1996, and respondent requested a hearing. A statement of issues was issued asserting, inter alia, that respondent's application was subject to denial pursuant to Business and Professions Code sections 480, subdivision (c) and 2960, subdivision (3), because he failed to disclose a material fact by not revealing his 1994 misdemeanor conviction. The statement of issues was withdrawn in July 1997 when respondent withdrew his application for registration as a psychological assistant.

¹ Applicant suffered a misdemeanor conviction on February 28, 1994, in the Municipal Court of California, County of Sonoma, upon a plea of nolo contendere, of a violation of Vehicle Code section 23103.5 (reckless driving while under the influence of alcohol). He was required to complete a first offender drunk driving program.

5. On July 1, 1997, respondent filed an application with the Board of Psychology seeking registration as a psychologist. The Board of Psychology sought to deny the application on the grounds respondent had failed to disclose material facts in his earlier application for registration as a psychological assistant, had been convicted of a crime (possession of cocaine with the intent to distribute) substantially related to the qualifications, functions and duties of a psychologist, and had used a controlled substance and alcoholic beverages to an extent dangerous to himself or others. Respondent requested and received a hearing. In its subsequent decision the Board of Psychology found that the federal crime of which respondent was convicted was substantially related to the qualifications, functions and duties of a psychologist (Factual Finding 2, p. 3), and that such conviction constituted cause for denial of respondent's application for registration as a psychologist (Determination of Issues 4, p. 12.) It also found that respondent had made a material misstatement in his application for registration as a psychological assistant, but that he had not done so with intent to deceive the Board of Psychology. (Factual Finding 8, p. 6.) And it found respondent had used alcohol to an extent dangerous to himself and others. (Factual Finding 15, p. 9.) However, the Board of Psychology also took note of respondent's rehabilitative efforts and effective October 22, 1998, it granted respondent a probationary registration and placed him on probation for five years. Effective March 7, 2003, the Board of Psychology terminated respondent's probation and granted him an unrestricted license to practice psychology.

6. Labor Code section 139.2, subdivision (m), provides in pertinent part:

The administrative director shall terminate from the list of medical evaluators any physician . . . who has been convicted of a misdemeanor or felony related to the conduct² of his or her medical practice or a crime of moral turpitude.

Complainant asserts that the decision of the Board of Psychology granting respondent a probationary license establishes that respondent's federal conviction was for a crime substantially related to the practice of his profession. Complainant further asserts that because the conviction was related to the practice of respondent's profession, pursuant to Labor Code section 139.2, subdivision (m), respondent cannot serve as a QME.

7. Respondent contends the decision does not establish that respondent's convictions were related to his profession. Respondent points out that even though the Board of Psychology found that cause to deny his application existed because he had been convicted of a crime substantially related to the qualifications, functions and duties of a psychologist, it went on to state "considering that 16 years have passed since respondent's conviction, a period during which he has remained drug-free and has made significant changes in his life, it is determined that respondent's application should not be subject to denial based upon that conviction."

² No definition of "conduct" is contained in the statute. Merriam-Webster On-Line defines conduct as "the act, manner, or process of carrying on."

Respondent's contention is not persuasive. Although the Board of Psychology determined, based upon respondent's rehabilitative efforts, that respondent's federal conviction would not be used as a basis for denial of a license to respondent, it clearly found that respondent's conviction was related to the practice of psychology.

8. Respondent also asserts that the finding of the Board of Psychology is not "res judicata" on the issue of whether his convictions are substantially related. However, the Board of Psychology is the agency responsible for determining what is or is not within the scope of practice of that profession. It is reasonable for DWC to rely upon the Board's determination when attempting to decide whether a conviction is related to the practice of psychology, the profession for which respondent seeks certification as a QME.

9. Lastly, respondent asserts that pre-licensure crimes related to the practice of a profession for which you are later licensed are not the type of crimes which were intended to be included in the exclusion set forth in Labor Code section 139.2, subdivision (m). Respondent fails to provide any legal support for this contention. A criminal offense that occurs prior to licensure can be related to the practice of a profession, as is clearly indicated by the findings contained in the decision of the Board of Psychology granting respondent a probationary license. The plain language of section 139.2, subdivision (m), requires the administrative director to terminate a QME who has been convicted of a misdemeanor or felony related to the conduct of his or her medical practice. No distinction is made between offenses occurring before or after licensure, which suggests an intent to exclude anyone from serving as a QME who has been convicted of a misdemeanor or felony related to the conduct of his or her medical practice. To adopt respondent's contention that offenses related to the practice of a profession that occur prior to licensure are not within the scope of section 139.2, subdivision (m), would create an inequitable dichotomy (thereby permitting some with criminal convictions related to the practice of their profession to serve), that is not supported by the language of the statute.

10. Labor Code section 139.2, subdivision (a), provides that [t]he administrative director shall appoint qualified medical evaluators . . ." Respondent is not a qualified medical evaluator due to his felony conviction.

Prior Applications

11. On February 1, 2004, respondent submitted a verified application for appointment as a QME. Block 10 on the application is entitled "Affirmations." It sets forth three statements and instructs applicants that "Initialing each box [next to the statements] affirms that you have read and agree to each of the statements."

Block 10, Paragraph A states, "My license to practice medicine is active and is neither restricted nor encumbered by suspension, interim suspension or probation. I certify that I have not been convicted of either a misdemeanor or felony related to my practice or a crime of moral turpitude." Respondent initialed the box next to Block 10, Paragraph A, thereby certifying under penalty of perjury the truth of the affirmation. He also signed a section entitled "Verification" which contained the affirmation "I have reviewed this completed application and

to the best of my knowledge the information contained herein and in the attached supporting documentation is true, correct and complete.” The verification further advised “the failure to provide truthful information shall result in denial of applicant’s appointment and/or disciplinary action.”

12. On December 29, 2004, respondent filed a verified application for appointment as a QME on which he again checked the box next to Block 10, Paragraph A, thereby certifying under penalty of perjury that the truth of the affirmation. He also signed the separate verification section.

13. Labor Code section 139.2, subdivision (k), provides in pertinent part:

Except as provided in this subdivision, the administrative director may, in his or her discretion, suspend or terminate the privilege of a physician to serve as a qualified medical evaluator if the administrative director, after hearing pursuant to subdivision (l), determines, based on substantial evidence, that a qualified medical evaluator: . . .

(6) Has made material misrepresentations or false statements in an application for appointment or reappointment as a qualified medical evaluator. . . .

California Code of Regulations, title 8, section 10, similarly provides that an application for appointment may be rejected if it contains false information.

14. Complainant asserts that respondent made a material misrepresentation in both of the applications he filed in 2004 seeking appointment as a QME. Complainant reasons that respondent’s convictions were found by the Board of Psychology to be related to the practice of psychology and therefore respondent’s affirmations that he had not been convicted of a crime related to his practice constituted a false statement and was a material misrepresentation.

15. Respondent contends that Block 10, Paragraph A is ambiguous and that he understood the affirmation to mean that he had not been convicted of any crime related to his practice as a licensed psychologist. Respondent notes that Block 10, Paragraph A refers to crimes “related to my practice.” Respondent believes that since his crimes occurred before he began practicing psychology, they were not related to his practice. Respondent denies any intent to deceive DWC by failing to disclose his convictions, and feels that the ambiguity in Block 10, Paragraph A should be construed in his favor.

16. As previously noted, Block 10, Paragraph A contains the following language: “I certify that I have not been convicted of either a misdemeanor or felony *related to my practice* or a crime of moral turpitude.” (Emphasis added.) Read narrowly the language could be interpreted to only refer to convictions related to the actual practice of a profession by the individual signing the affirmation. Read broadly, it could be interpreted as referring to any

misdemeanor or felony conviction having a connection or relevance to the applicant's profession. Both interpretations are reasonable. While it could be argued that respondent should have known, given the past proceedings with the Board of Psychology, that DWC, as a licensing board, would want to know about past convictions, his interpretation of Block 10, Paragraph A is not clearly unreasonable. Therefore, it cannot be found that he provided false information when he initialed the box next to Block 10, Paragraph A.

Other Matters

17. Respondent obtained a Doctor of Psychology degree from the California School of Professional Psychology in Alameda, California in 1997. He obtained a Post-Doctorate Certificate in Neuropsychology in June 2004 from the Fielding Institute in Santa Barbara, California. In June 2007 he obtained a Post-Doctorate Masters in Psychopharmacology from the California School of Professional Psychology-Alliant International University in San Francisco, California.

LEGAL CONCLUSIONS


1. Cause to deny respondent's application for appointment as a QME exists pursuant to Labor code section 139.2, subdivision (m), as set forth in Findings 7 through 10. Respondent's conviction of crimes related to the conduct of his or her medical practice preclude his appointment as a QME.

2. It was not established that cause to deny respondent's application for appointment as a QME exist pursuant to Labor code section 139.2, subdivision (k)(6).

ORDER

The application of Michael A. Fraga, Psy.D., for appointment as a qualified medical evaluator is denied.

DATED: 12/13/07


CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED

FEB - 3 2009

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA,
BY Mark H. Tansil DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA
SONOMA COUNTY

MICHAEL FRAGA, Psy.D,
Petitioner,
vs.
DIVISION OF WORKERS' COMPENSATION,
an agency of the State of California,
Respondent.

Case No. SCV 242435

**ORDER
DENYING PETITION FOR WRIT OF
ADMINISTRATIVE MANDAMUS
and STATEMENT OF DECISION**

ORDER

The petition for writ of administrative mandamus filed by petitioner Michael Fraga, Psy.D. in this matter came on regularly for hearing on February 3, 2009 in Department 18 of this Court, Hon. Mark H. Tansil presiding. Frederick J. Engbarth, Esq. appeared for Petitioner, and Michael D. Hurley, Esq. appeared for Respondent. After considering the parties' moving and responding papers and the argument of counsel presented at the hearing, and good cause appearing therefor,

IT IS ORDERED that the petition is dismissed in its entirety.

Dated:

2/3/09

Mark H. Tansil
HON. MARK H. TANSIL
Judge of the Superior Court

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9

2
3
4
5
6
7

890

1
2
3
4

5

1 The court further finds that the respondent followed a statutory mandate in denying the requested
2 certification. There was no abuse of discretion. All necessary due process was provided to the
3 petitioner. Consequently, the petition is dismissed in its entirety.

4 Dated:

2/3/09



HON. MARK H. TANSIL
Judge of the Superior Court